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In the Supreme Court of the United States.

OCTOBER TERM, 1976.

No. 76-1195

THE JUSTICES OF THE SUPERIOR COURT OF MASSACHUSETTS,
PETITIONERS,

v.

KENNETH JACKSON ET AL.,
RESPONDENTS.

ON CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Conditional Cross-Petition for Writ of Certiorari.

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No. .

THE JUSTICES OF THE SUPERIOR COURT OF MASSACHUSETTS,
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v.

KENNETH JACKSON ET AL.,
RESPONDENTS.

ON CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Conditional Cross-Petition for Writ of Certiorari.

Petitioners, Justices of the Superior Court, and respondents in Case No. 76-6200, have filed an Opposition to the granting of the writ of certiorari as to the issues presented therein. However, in the event that certiorari is granted, petitioners request that the entire case be brought for review

before this Court.[1] In particular, petitioners request review of the sole issue which was the basis for their appeal to the Court of Appeals for the First Circuit.

Issue Presented.

"Whether the federal district court abused its discretion by ordering a stay of all pending criminal proceedings in the state court against named petitioners in a habeas corpus action and all others similarly situated?"

For the purpose of this conditional cross-petition, petitioners adopt the statement of jurisdiction, citation to opinions below and statement of prior proceedings as set out in Jackson et al.'s petition for writ of certiorari, No. 76-6200.

[1] Regardless of the action of the Court of Appeals in deciding the substantive issue, the initial injunctive order of the District Court, which is in apparent conflict with the opinion of this Court in *Younger* v. *Harris*, 401 U.S. 37 (1971), and which has seriously affected the administration of justice in this Commonwealth, is still, arguably, good law in the District of Massachusetts.

The fact that the Court of Appeals has vindicated the petitioners' substantive position on the retrospectivity of *Breed* v. *Jones*, 421 U.S. 519 (1975), does not alter the petitioners' contention that the injunctive order of the District Court was a violation of ancient principles of comity and federalism. *See, e.g., Ex parte Young*, 209 U.S. 123 (1908).

This Court must not only review the issue of substantive law but must examine the case in its full procedural context, which context will reveal an error as damaging to the interests of the petitioners as that claimed by the respondents.

Reasons for Granting Review.

A. The Order of the Federal District Court Granting a Stay of Pending State Criminal Proceedings under the Circumstances of this Case Continues to have a Vast and Disruptive Effect upon the Orderly Administration of Justice in the Commonwealth.

The order of the District Court for the District of Massachusetts ordered that ". . . the defendants stay all state court proceedings against the petitioners and all those juveniles who, prior to May 27, 1975 were the subject of juvenile delinquency complaints which were dismissed pursuant to M.G.L. ch. 119 § 61 and who are now awaiting trial in the Superior Court on indictments alleging the same substantive offense, where the said state court proceedings are pursuant to those indictments. . . ." Order, November 8, 1976 (App. A, p. 1a).

The order encompasses the pending criminal trials of well over 80 defendants.

The petitioners appealed the order to the Court of Appeals. The Court of Appeals, while vacating the stay on the ground that *Breed* v. *Jones*, 421 U.S. 519 (1975), was not retroactive, held that:

> "The Commonwealth, nevertheless, contends that under *Younger* v. *Harris*, 1971, 401 U.S. 37, we should vacate the stay without reaching the merits. In view of the Massachusetts court's outright rejection of retroactivity, precluding any realistic opportunity for petitioners to assert their *Breed* claim in their criminal prosecutions, *see id.* at 45, 46, we doubt that we would accept this contention if we felt that retroactivity were called for, but our reaching the merits

will not, we suspect, incur the Commonwealth's serious objections under the circumstances. Petitioners never have objected. We may, of course, decide the merits, since only a question of law is involved. *Hagopian* v. *Knowlton*, 2 Cir., 1972, 470 F. 2d 201." *Jackson* v. *Justices of the Superior Court*, Slip Opinion, p. 3, n. 1 (App. B, p. 9a, n. 1).

Contrary to the conclusion of the Court of Appeals that the petitioners will not object, petitioners have consistently maintained that the stay imposed by the District Court was a clear violation of principles of comity and federalism.

In addition, petitioners continue to suffer great and immediate injury as a result of the District Court order because this Court has, at least temporarily, granted respondent's Application for Stay of the Order of the Court of Appeals (*Order*, Brennan, J., January 25, 1977).

Therefore, since petitioners continue to be restrained from proceeding against the named and unnamed respondents in this as yet uncertified class action petition for writ of habeas corpus, the question of the propriety of the issuance of such a sweeping stay in the first instance remains viable and a point of actual controversy in Case No. 76-6200.

Although the manner in which the Court of Appeals chose to treat the issue has resulted in an apparent judgment for petitioners, it is petitioners' position that the request for a stay and request for judgment on the merits are distinct and capable of separate and not necessarily identical result. It is petitioners' position that the question of the propriety of the stay may and should be decided separately from the issue of the retroactivity of *Breed*. Decision on the injunctive issue is in no way dependent on or controlled by the ultimate decision as to

whether the Supreme Judicial Court and the Court of Appeals were correct in their analyses and ultimate holdings on the retroactivity issue. Compare *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943), and *Douglas* v. *City of Jeannette*, 319 U.S. 157 (1943).

B. A Stay of Pending Criminal Proceedings of the Scope Envisioned by the Order of the District Court is Unprecedented.

The stay by the federal court enjoined prosecution of named and unnamed members of the alleged class. The entry of a stay of this scope under the circumstances of this case is totally unprecedented.

First, the only basis for a grant of a stay as to unnamed members of an undetermined class is to prevent loss of jurisdiction or extinction of the parties. *United States* v. *Shipp*, 203 U.S. 563 (1906); *Adderly* v. *Wainwright*, 272 F. Supp. 530 (M.D. Fla. 1967). Neither extraordinary circumstance is present in the instant case.

Second, the instant class has never been certified. Moreover, petitioners maintain that there has never been established a common factual pattern among the respondents. The burden remains upon all respondents to establish that an adjudicatory hearing was held at the juvenile stage of the proceedings, for the Supreme Judicial Court has ruled that it was not statutorily mandated that such a hearing be held prior to *Breed* v. *Jones*, *supra*, in *A Juvenile* v. *Commonwealth*, Mass. Adv. Sh. (1976) 1237, 1246. See also *Stokes* v. *Commonwealth*, Mass. Adv. Sh. (1975) 3030. Therefore, petitioners submit that the grant of a stay as to unnamed respondents was without precedent and constitutes a totally impermissible interference with pending state court criminal proceedings.

C. The Issue Presents a Substantial and Important Question Concerning Federal-State Relations.

Traditionally, the federal court has interfered with state court criminal proceedings in only the most extraordinary circumstances. *Douglas* v. *City of Jeannette*, 319 U.S. 157 (1943).

In *Younger* v. *Harris*, 401 U.S. 37 (1971), this Court stated that the standard which must be met in order to justify federal intervention in pending state criminal procedures was a showing of bad faith, harassment or other unusual circumstances. In the instant case there is no allegation of bad faith or harassment. The Court of Appeals apparently has created a general futility rule to avoid the *Younger* doctrine. It has read *Younger* to stand merely for the proposition that, once a state court has ruled on a particular constitutional question, the federal court, on a petition for writ of habeas corpus involving the same issue, but different parties, may enjoin pending state court proceedings until the constitutional claim is reexamined in the federal forum. Such a view, petitioners suggest, entails a "failure to give effect to the principle that state courts have the solemn responsibility, equally with the federal courts 'to guard, enforce, and protect every right granted or secured by the Constitution of the United States. . . .' *Robb* v. *Connolly*, 111 U.S. 624, 637 (1884)." *Steffel* v. *Thompson*, 415 U.S. 452, 460-461 (1974). The effect of such a proposition is to place the federal court in a position of general supervision over the state court. *Cupp* v. *Naughten*, 414 U.S. 141, 146 (1973).

Petitioners suggest that nothing in recent Supreme Court decisions supports the theory of a general futility exception to the *Younger* doctrine. Moreover, to treat the *Younger* doctrine as merely a restatement of the exhaustion

of state remedies rule is to totaly ignore the precious principles of federalism and comity which that decision and its progeny sought to preserve. And it results in an equation of the question of exhaustion or abstention with the entirely separate question of granting injunctive relief. *Lake Carriers' Assn.* v. *MacMullan*, 406 U.S. 498 (1972).

D. There is a Conflict Between the Courts as to Whether a Claim of Violation of Double Jeopardy should Enjoy Preference to Any Other Constitutional Claim.

The lower federal District Court justified its initial interference with the state criminal process on the basis that a claim of double jeopardy somehow constituted an exceptional circumstance.[2]

Petitioners suggest that a claim of double jeopardy does not justify deviation from *Younger* requirements to any greater extent than does a claim of denial of right to speedy trial or a claim based upon the unconstitutionality of a statute under which a defendant has been complained of.

[2] Although some courts (*United States ex rel. Triano* v. *Superior Court of New Jersey*, 393 F. Supp. 1061 (D. N.J. 1975); *Thames* v. *Justices of the Superior Court*, 385 F. Supp. 41 (D. Mass. 1974)) have held that double jeopardy does constitute a special circumstance, it is important to note that in those cases there was no dispute as to whether the defendants had been placed in jeopardy; the only open question was whether a mistrial had been granted over defendant's objection. In the present case there is an unresolved dispute as to whether or not the respondents were in fact put in jeopardy, a dispute which cannot be resolved without evidentiary hearings in either the state or federal courts, for the Supreme Judicial Court has ruled, as a matter of state law, that it was not statutorily mandated that adjudicatory hearings be held prior to transfer hearings. *Stokes* v. *Commonwealth*, *supra*; *A Juvenile* v. *Commonwealth*, *supra*.

Neither claim is a sufficient basis for federal intervention in pending state court proceedings. *Moore* v. *DeYoung*, 515 F. 2d 437 (3d Cir. 1975); *Younger* v. *Harris*, *supra*.

In an analogous situation, defendants have sought to appeal the denial of motions to dismiss on the grounds of double jeopardy pursuant to 28 U.S.C. § 1291. The various Circuits have split as to whether disposition of such motions constituted a final order appealable under § 1291. The Fifth and Ninth Circuits have held that double jeopardy claims do not constitute a special circumstance.

> "While the right against former jeopardy may be violated by a retrial, the right is neither lost nor lacking in remedy. If the hazards, expense and inconvenience of retrial are the consequences of the violation of the right, this case is no more distinguishable on finality grounds than a violation of any other constitutional right which results in the defendant's being subjected to the ordeal of a trial and conviction on the road to reversal. *See, e.g., United States* v. *Doucet*, 5 Cir. 1972, 461 F. 2d 1095." *United States* v. *Bailey*, 512 F. 2d 833, 837 (5th Cir. 1975); see also, *United States* v. *Young*, 544 F. 2d 415 (9th Cir. 1976).

The Second, Third and Eighth Circuits have held to the contrary.[3]

Petitioners suggest that if the double jeopardy clause is to be elevated to a position of supremacy over all other con-

[3] *United States* v. *Beckerman*, 516 F. 2d 905 (2d Cir. 1975); *United States* v. *DiSilvio*, 520 F. 2d 247 (3d Cir. 1975); *United States* v. *Barket*, 530 F. 2d 181 (8th Cir. 1975).

stitutional guarantees (whether for the purpose of avoiding *Younger* v. *Harris*, *supra*, or the finality requirement under 28 U.S.C. § 1291) then that determination should be made by this Court.[4]

Finally, petitioners submit that the sweeping injunction of the prosecution of a substantial number of criminal cases pending in the Superior Court of the Commonwealth is inconsistent with the doctrine of non-intervention by federal courts in pending state criminal prosecutions as enunciated in *Younger* v. *Harris*, *supra*. If a new and novel exception to that doctrine is to be enunciated, it must, in the interest of harmonious state and federal relations, be enunciated by this Court.

Conclusion.

Although the petitioners oppose the granting of a writ of certiorari in Case No. 76-6200, they respectfully request that, in the event that certiorari should be granted, the Court also review the vital issue raised herein involving

[4] Petitioners suggest that the substantiality and worthiness of the issue for determination has been evidenced by this Court's consideration of the issue in oral argument in *Abney* v. *United States*, No. 75-6521, argued January 17, 1977.

federal intervention in pending state criminal proceedings, in particular, whether the court below properly held that a new and novel exception to the *Younger* doctrine exists.

Respectfully submitted,

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Appendix A.

UNITED STATES DISTRICT COURT.
DISTRICT OF MASSACHUSETTS.

KENNETH JACKSON, ET AL.

v. CA 76-3782-T

JUSTICES OF THE SUPERIOR
COURT OF MASSACHUSETTS

Order.

November 8, 1976.

TAURO, D.J.

In accordance with the memorandum issued today, it is ORDERED that the petitioners' motion for a stay be granted, and it is hereby ORDERED that the defendants stay all state court proceedings against the petitioners and all those juveniles who, prior to May 27, 1975 were the subject of juvenile delinquency complaints which were dismissed pursuant to M.G.L. ch. 119 § 61 and who are now awaiting trial in the Superior Court on indictments alleging the same substantive offense, where the said state court proceedings are pursuant to those indictments. This stay will remain in effect pending final determination by this court of the

claims raised in their petition, or until the named petitioners or individual members of the class elect voluntarily to proceed otherwise, whichever shall occur first.

JOSEPH L. TAURO,
United States District Judge.

UNITED STATES DISTRICT COURT.
DISTRICT OF MASSACHUSETTS.

KENNETH JACKSON, ET AL.

v. CA 76-3782-T

JUSTICES OF THE SUPERIOR
COURT OF MASSACHUSETTS

Memorandum.

November 8, 1976.

TAURO, D.J.

Petitioners in this case seek to have this court issue writs of habeas corpus on behalf of them and the members of the class they seek to represent. Petitioners, and the persons in the class they seek to have certified, were "bound over" by juvenile courts in Massachusetts prior to the decision of the United States Supreme Court in *Breed v. Jones*, 421 U.S. 519 (1975) on May 27, 1975, and have not yet been tried in the Superior Court.

Petitioners seek to prevent the occurrence of trials on the pending indictments in Superior Court on the grounds that such trials would subject them to double jeopardy. These trials were stayed, as a group, by the Superior Court, pending decision by the Massachusetts Supreme Judicial Court in a representative case. Following the issuance of that court's opinion in *Commonwealth v. A Juvenile* (No. 2) Mass. Adv. Sh. 1852, 351 N.E. 2d 521 (1976) on July 15, 1976, the cases of the petitioners here were set down for trial. The trial of one of the named petitioners, John Hardy, is set for tomorrow, November 9, 1976.

Petitioners have moved for a stay of their trials pending decision of their petition on the merits. This court grants their motion for a stay of all state court proceedings against them and the members of the class consisting of all juveniles who, prior to May 27, 1975, were the subject of juvenile delinquency complaints which were dismissed pursuant to M.G.L. ch. 119 § 61 and who are now awaiting trial in the Superior Court on indictments alleging the same substantive offense where the state court proceedings are pursuant to those indictments.

The court has jurisdiction of this case under 28 U.S.C. § 2254. Petitioners have exhausted their state court remedies fully. It is not necessary that a judgment of conviction enter before a habeas corpus petition may be entertained, where the substance of the claim is that the occurrence of the trial will subject the petitioner to double jeopardy. *Thames v. Justices of the Superior Court*, 383 F. Supp. 41 (D. Mass. 1974); *U.S. ex rel Russo v. Superior Court of New Jersey*, 483 F. 2d 7 (3d Cir. 1973). Furthermore, this court has jurisdiction under 28 U.S.C. § 2251 to stay state court proceedings where it is necessary to do so to prevent the state from acting in a manner which will render relief by the Federal court meaningless. *U.S. v. Shipp*, 203

U.S. 563 (1906); *U.S. ex. rel Triano v. Superior Court of New Jersey*, 393 F. Supp. 1061, (D. N.J. 1975), aff'd 523 F. F. 2d 1052. (Stay issued to prevent subjecting petitioner to trial where violation of double jeopardy alleged); *Fouquette v. Bernard*, 198 F. 2d 96 (9th Cir. 1952). (Stay issued to prevent execution of petitioner pending decision on the merits of his appeal).

Although the stay here will prevent the petitioners from being subject to trial rather than from being subject to capital punishment, the situations are comparable, because, in both, the issuance of the stay is necessary to protect the petitioner's federally guaranteed right. The evil sought to be prevented by the double jeopardy clause is the subjection of the defendant to a second trial; its goal is to prevent a second trial from taking place at all. *Robinson v. Neil*, 409 U.S. 505, 509 (1973). Should this court refrain from issuing a stay and subsequently decide that the trial of the petitioners in the Superior Court subjected them to double jeopardy, it would be unable to provide the petitioners with an effective remedy.

The fact that the court has not yet certified the class requested by the petitioners is no bar to its issuance of a stay as to the whole class. *Alderly v. Wainwright*, 272 F. Supp. 530 (M.D. Fla. 1976); *Hill v. Nelson*, 271 F. Supp. 439 (N.D. Cal. 1967). The court will hear argument on the motion for certification of the class as soon as is feasible to do so. Until that time, however, issuance of the stay as to members of the class as defined by the petitioners in their complaint is necessary to protect the jurisdiction of this court, and its ability to fashion an effective remedy.

The issuance of this stay is not barred by the principles of comity and federalism articulated in the line of cases beginning with *Younger v. Harris*, 401 U.S. 37 (1971). A primary focus of those cases is the necessity that the plaintiff

exhaust fully his remedies in the state court; that is, that the Federal court should refrain from acting where the plaintiff failed to take advantage of an opportunity to raise the federal issues involved in state court, despite the existence of a competent state forum. *Gibson v. Berryhill*, 411 U.S. 564, 577 (1973); *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 609 (1975). Here, the petitioners have given the state court every opportunity to hear their claim before they have sought to make use of the federal forum. Therefore, the underlying reasons for declining jurisdiction as taught in *Younger* are absent here.

In addition, *Younger* stressed that federal intervention in a state court proceeding is appropriate where the petitioner can show irreparable injury which is "both great and immediate." *Younger v. Harris, supra*, 401 U.S. at 45. The Court went on to explain that "the threat to the plaintiff's federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution." *Id.* The case at bar is just such a case. Not only can the threat to the petitioner's federally protected right not be eliminated by a defense in a single criminal prosecution; rather, the requirement that the petitioners go through a second trial to offer a criminal defense violates the very federal right they seek to protect.

Finally the court notes that harm to the state from the issuance of this stay is not great where the state has already voluntarily stayed these trials for more than a year. In view of the enormous harm which would be caused to the petitioners should the stay not issue, the Court orders that their motion be granted.

An order will issue.

JOSEPH L. TAURO,
United States District Judge.

Appendix B.

United States Court of Appeals for the First Circuit

No. 76-1524

KENNETH JACKSON ET AL.,
PETITIONERS, APPELLEES,
v.
JUSTICES OF THE SUPERIOR COURT OF MASSACHUSETTS,
RESPONDENTS, APPELLANTS.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
(HON. JOSEPH L. TAURO, *U. S. District Judge*)

Before COFFIN, *Chief Judge*,
ALDRICH and CAMPBELL, *Circuit Judges*.

Barbara A. H. Smith, Assistant Attorney General, Chief, Criminal Appellate Section, with whom *Francis X. Bellotti*, Attorney General, *Donald P. Zerendow*, Assistant Attorney General, Acting Chief, Criminal Bureau and *Michael C. Donahue*, Assistant Attorney General, were on brief, for appellants.
Russell K. Dunning for appellees.

January 14, 1977

ALDRICH, *Senior Circuit Judge*. In this case we are faced with the question whether the decision of the Supreme Court in *Breed* v. *Jones*, 1975, 421 U.S. 519, is to be given retroactive application. *Breed* dealt with the impact of the double jeopardy clause of the Fifth Amendment on the procedure by which it is determined that a juvenile should be tried in adult court rather than treated

as a juvenile. There are basically two ways that this determination can be made. One is to commence with a purely investigatory hearing in the juvenile court directed solely to the question of transfer. The other is by a trial on the merits in the juvenile court, following which the court may sentence the defendant as a juvenile, or dismiss the proceedings and bind him over to the general sessions, in Massachusetts, the superior court, for a full criminal trial, leading to a different type of sentence. In *Breed,* a unanimous Court held that to subject the defendant to an adjudicatory proceeding, other than one limited to the question of transfer, and then, instead of sentencing, transfer him to an adult trial, amounts to double jeopardy.

The *Breed* Court made no comment with respect to retroactivity. When the Massachusetts Supreme Judicial Court was faced with this question it ruled that *Breed* should not be applied retroactively, and that persons such as the petitioners herein may be put to trial in the superior court. *Stokes* v. *Commonwealth,* Mass. Adv. Sh. (1975) 3030, 336 N.E.2d 735; *Commonwealth* v. *A Juvenile* (*No. 2*), Mass. Adv. Sh. (1976) 1854, 351 N.E.2d 521. The present habeas corpus proceeding was filed in the district court in the form of a class action on behalf of all persons in Massachusetts who had been bound over following juvenile court proceedings prior to the decision in *Breed,* but who have not yet been tried in the superior court. The district court, at an early stage, stayed all state proceedings against the members of the class, pending its final determination of the claims. Respondent Justices, hereinafter the Commonwealth, appeal from the stay order. Because of the question's importance, we requested both

sides to brief and argue the merits, and they have complied.[1]

Inasmuch as none of the petitioners has yet been tried in the superior court, they first argue that even prospective application of *Breed* would bar their trials. They assert that the Supreme Court has ruled that even nonretroactive decisions are to be applied to cases where the "violation" occurs after the date of the decision in question, *see, e.g., Desist* v. *United States,* 1969, 394 U.S. 244, 253; *Stovall* v. *Denno,* 1967, 388 U.S. 293, 296, and that in the instant case the "violation" is not the juvenile proceeding but the superior court trial. We think this argument misconstrues the Court's decisions. The Court's focus has been on "the moment at which the discarded standards were first relied on," *Jenkins* v. *Delaware,* 1969, 395 U.S. 213, 218, the reason being that a nonretroactive decision ought to be applied only to cases where the law enforcement agencies had the opportunity to conform their conduct to the new standards, *id.* In the present case that point would be the time of the juvenile proceedings, for once an adjudicatory hearing was held and a decision to transfer made, the Commonwealth could not prosecute the petitioners in conformity with *Breed.* The case is on all fours with *Jenkins,* ante, where the Court held that statements obtained from defendants without *Miranda* warnings, *see Miranda* v. *Arizona,* 1966, 384 U.S. 436, could be used in retrials occurring after the date of the *Miranda* decision.

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[1] The Commonwealth, nevertheless, contends that under *Younger* v. *Harris,* 1971, 401 U.S. 37, we should vacate the stay without reaching the merits. In view of the Massachusetts court's outright rejection of retroactivity, precluding any realistic opportunity for petitioners to assert their *Breed* claim in their criminal prosecutions, *see id.* at 45, 46, we doubt that we would accept this contention if we felt that retroactivity were called for, but our reaching the merits will not, we suspect, incur the Commonwealth's serious objections under the circumstances. Petitioners never have objected. We may, of course, decide the merits, since only a question of law is involved. *Hagopian* v. *Knowlton,* 2 Cir., 1972, 470 F.2d 201.

Petitioners seek to distinguish *Jenkins* on the ground that the "violation" in *Jenkins* was the interrogation without *Miranda* warnings, while in the instant case the "violation" would be the superior court trial. However, an interrogation without *Miranda* warnings is not, in itself, a violation of the Fifth Amendment; it is the use of such statements in his criminal trial that compels the defendant "to be a witness against himself." Although in *Jenkins,* as here, it is the post-decision conduct — the retrial in *Jenkins*, or the superior court trial here — which constitutes the "violation," the point of reliance is the pre-trial conduct — the interrogation in *Jenkins,* or the juvenile proceedings here. Thus, a mere prospective application of *Breed* would not bar petitioners' superior court trials.

Ordinarily, the choice between retroactivity and prospectivity of a new rule turns on consideration of three factors: "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." *Stovall* v. *Denno*, ante, at 297. Petitioners, however, relying on *Robinson* v. *Neil,* 1973, 409 U.S. 505, contend that double jeopardy claims are sui generis, and that decisions invalidating state procedures under the double jeopardy clause must, without more, be given retroactive application. It is true that the Court in *Robinson* stated that the usual retroactivity analysis was not appropriate in deciding that retroactive effect was to be given to the decision in *Waller* v. *Florida,* 1970, 397 U.S. 387, barring the trial on state charges of persons already tried and convicted on municipal charges for the same acts, 409 U.S. at 507, but it is equally true that the *Robinson* Court eschewed "an ironclad . . . classification of cases" for retroactivity analysis, *id.* at 509. We see nothing in *Robinson* to indicate disapproval of the Court's earlier statement that "the retroactivity or nonretroactivity of a rule is not automatically determined by the provision of the Constitution on which the dictate is based." *Johnson* v. *New Jersey,* 1966, 384 U.S. 719, 728. In the case at bar we face a more complex, and at the same time a less severe, situation than that in *Robinson,* where the issue was whether persons already tried, convicted, and punished could be again put to trial and punished for the same conduct. *Breed* does not preclude separate juvenile and adult proceedings; rather, it closely limits the issues which may be considered in the first proceeding. We consider the question whether the Commonwealth's failure to anticipate those limits should produce a windfall to the petitioners, such that even if guilty they will not even be punished once, to be a matter not susceptible to a quick answer based on the constitutional label involved.

Restating the *Stovall* tests to fit the present case, our questions are: (a) What would be the effect on defendants of not applying *Breed* retroactively? (b) Were the Massachusetts legislature and judiciary reasonable in not anticipating the *Breed* ruling? (c) What would be "the effect on the administration of justice of a retroactive application"? The last question is readily answered. We learned at oral argument that in four of fourteen counties in Massachusetts some eighty juveniles had been ordered transferred and not yet tried. Doubtless, there must be many more elsewhere. Doubtless, too, there must be many persons presently serving adult sentences who will seek release under a retroactive interpretation because of having been transferred from the juvenile court.

We must also observe that all such persons were transferred to the regular criminal sessions because they were regarded as sufficiently serious offenders to be considered unlikely candidates for rehabilitation through the juvenile system. It would be impossible to overestimate the seriousness of affording retroactivity to the *Breed* rule.

We turn to the joint questions of the newness, vel non, of the *Breed* rule, and the reasonableness of the Massachusetts belief that its juvenile procedure was one continuing jeopardy, it being clear that unless a decision makes new law it cannot be given only prospective effect. *Michigan* v. *Payne,* 1973, 412 U.S. 47, 50-51; *Milton* v. *Wainwright,* 1972, 407 U.S. 371, 381-82 n.2 (Stewart, J., dissenting); *Chevron Oil Co.* v. *Huson,* 1971, 404 U.S. 97, 106; *Desist* v. *United States,* ante, at 247-48. While, concededly, *Breed* was not a case which, for example, by overruling prior Supreme Court decisions manifestly marked "a clear break with the past," *Desist* v. *United States,* ante, at 248, we do not believe that it was so clearly a mere application of established principles that we could apply it retroactively without further analysis. Prior to *Breed,* decisions on the impact of the double jeopardy clause on transfers from juvenile to adult courts appear to have been limited to state court rulings upholding transfer proceedings against double jeopardy attack. The landmark Supreme Court decision bringing juvenile proceedings within the scope of constitutionally mandated criminal procedures, *In re Gault,* 1967, 387 U.S. 1, is less than a decade old, and *Breed* can be seen as a decision settling one of the many questions left unresolved in its wake. Perhaps a more perceptive consideration of the impact of *Gault* would have, even before *Breed,* led to the conclusion that transfer procedures such as Massachusetts employed could not withstand constitutional scrutiny, but we must attach weight to the number of courts which, prior to *Breed,* failed to take that step. *See* cases cited in *A Juvenile,* 1974, 364 Mass. 531, 306 N.E.2d 822, 829. The fact that *Breed* may have been to some extent foreshadowed does not require its retrospective application. *Desist* v. *United States,* ante, at 248.

This brings us to the foremost consideration under *Stovall,* whether the purpose of the new rule would be substantially frustrated by denying retroactive application. *Desist* v. *United States,* ante, at 249. In *Breed* the Court identified two evils in the procedure of transfer after an adjudicatory hearing, the elimination of which may be considered the purpose of the decision: (1) that the defendant is twice subjected to the "heavy pressures and burdens — psychological, physical, and financial" incident to trial, 421 U.S. at 530, and (2) that the defendant in the juvenile proceeding is faced with the dilemma of either standing mute and risking an adverse disposition or defending on the merits and possibly "prejudicing his chances in adult court if transfer is ordered" by giving the prosecution an opportunity to review his defense in advance, *id.* at 540.

We consider first whether the purpose of eliminating the stress of a second trial will be fostered by retroactive application of *Breed.* As we previously noted, there are two classes of possible beneficiaries of retroactive application; those who have already been tried in superior court after transfer, and those who, like petitioners herein, have been ordered transferred but have not yet been tried.[2] As to those already tried, we face a *fait*

[2] Although only the latter are before us as petitioners in the instant suit, if *Breed* is held retroactive, presumably it will be equally claimed by those already tried and serving sentence. To anticipate for a moment, we use the word "claim" advisedly. We do not decide in this case that a juvenile who has already been tried, particularly if tried pre-*Breed*, necessarily stands in the same position as one not yet tried. There may well be a difference between past reliance and the right to make use hereafter of benefits acquired from juvenile proceedings contrary to *Breed*.

accompli — the stresses and burdens of trial have already been incurred. Retroactive application of *Breed* cannot undo this, and thus would not serve the first purpose of the decision. *See Linkletter* v. *Walker,* 1965, 381 U.S. 618, 637.

As to those not yet tried, the ordeal of a second trial can be prevented. The question is whether the Commonwealth's interest outweighs the petitioners' interest in being free from this burden. The *Breed* decision holds that this interest is sufficiently weighty to preclude the states from adopting a procedure which imposes this double stress, but it is a different question whether the interest is so compelling that it requires the release of the petitioners, now that it is too late to prosecute them in a single proceeding.[3] The rule here, of course, is not absolute. It has long been the law that the double jeopardy clause does not bar a retrial after a mistrial has been declared without the defendant's consent if "there is a manifest necessity for the [mistrial], or the ends of public justice would otherwise be defeated." *United States* v. *Perez,* 22 U.S. (9 Wheat.) 579, 580 (Story, J.). Even where a mistrial was the result of some prosecutorial error, retrial is not always barred. Although a mistrial caused by a problem which the prosecutor knew of before the trial began prevented a retrial in *Downum* v. *United States,* 1963, 372 U.S. 734, where a mistrial was declared due to a defect in the indictment which was not discovered until after the jury was empaneled the Court held that a retrial was permissible, *Illinois* v. *Somerville,* 1973,

[3] The fact that defendant Jones secured habeas corpus relief in *Breed* does not answer the question. The Court has recognized the anomoly which results from denying general retroactive application, yet applying the new rule in the case in which it is announced, but has indicated that the anomoly is a necessary evil of "adherence to sound principles of decision-making." *Stovall* v. *Denno,* ante, at 301.

410 U.S. 458. Drawing up an indictment improperly is not conduct which could be condoned in advance, but once it had occurred, and could not be undone, the defendant's interest in avoiding the personal strain of a second proceeding was not considered sufficient to preclude his prosecution. Similarly, while *Breed* prevents the Commonwealth from hereafter subjecting juveniles to the stresses of two adjudicatory proceedings, we believe that "the ends of public justice" would be unwarrantedly frustrated by barring petitioners' superior court trials, now that it is too late to prosecute them in a single trial, solely to avoid the pressures and burdens of a second trial.

The second purpose of *Breed* — avoiding the unfairness of making the defendant "tip his hand" before trial — can call for relief from pre-*Breed* proceedings, at most, only in cases where hand-tipping occurred. Whether or not the defendant was prejudiced, and if so, to what extent, depends on precisely what took place in the juvenile court, and whether the prosecution thereby gained, and later used, a tactical advantage in the adult trial. If this benefit to the state can be redressed, or obviated, on an individual basis, there is no need for retroactivity at all.

The Court has uniformly held that where those convicted prior to decisions adopting rules designed to prevent the possibility of unfairness may make a particularized showing of prejudice, this is sufficient. Thus in *Johnson* v. *New Jersey,* ante, the decisions in *Escobedo* v. *Illinois,* 1964, 378 U.S. 478, and *Miranda* v. *Arizona,* ante, were held nonretroactive, defendants still having the opportunity to show that their confessions were involuntary. In *Stovall* v. *Denno,* ante, where the requirement of counsel at pretrial confrontations for identification established in *United States* v. *Wade,* 1967, 388 U.S. 218,

and *Gilbert* v. *California,* 1967, 388 U.S. 263, was held nonretroactive, the Court went on to consider whether the confrontation at issue in that particular case was so suggestive and error-prone as to amount to a denial of due process. The decision in *McCarthy* v. *United States,* 1969, 394 U.S. 459, holding that a defendant whose guilty plea was accepted in violation of F.R.Crim.P. 11 must be allowed to replead, was held nonretroactive in *Halliday* v. *United States,* 1969, 394 U.S. 831, the Court noting that the voluntariness of a particular defendant's plea was still open to attack. *North Carolina* v. *Pearce,* 1969, 395 U.S. 711, requiring that the judge state his reasons for imposing a more severe sentence on retrial after appellate reversal of his conviction, was held nonretroactive in *Michigan* v. *Payne,* ante, where the Court noted that the defendant could still show that his sentence was infected by vindictiveness and observed that,

> "It is an inherent attribute of prophylactic constitutional rules, such as those established in *Miranda* and *Pearce,* that their retroactive application will occasion windfall benefits for some defendants who have suffered no constitutional deprivation." 412 U.S. at 53.

The balance of these matters may not compel a single answer, but we believe it reasonably permits one. The seriousness of the impact on the state of granting retroactivity is obvious. The most significant aspect of denying it, so far as petitioners are concerned, would be if the state obtained some benefit from disclosures made at the initial hearing. Since this is remediable, general retroactivity would be overkill; the extent, if any, of the state's undue advantage may be determined on an individual, case by case basis.

There remains the question of how this should be accomplished. Manifestly, not in a class action. Manifestly, too, it is relief that should first be sought in the state court. *Cf. Jackson* v. *Denno,* 1964, 378 U.S. 368, 393. While the Massachusetts court has, in previous actions, denied retroactive application of *Breed,* this more limited relief has never been denied. It is not for us to assume that it will be. On this basis the present action is premature even as to the named petitioners.

We add that we have not made any final analysis of what, if anything, a transferred juvenile can, or must show to establish that his adult trial was fundamentally unfair due to the advantage which the state incurred at his juvenile hearing. It is sufficient for the moment that this must be his path, as distinguished from asserting general retroactivity.

The stay will be vacated in ten days, at which time the district court is directed to dismiss the complaint.

COFFIN, *Chief Judge,* dissenting. Although I am in sympathy with the result reached by the court in this deeply troubling case, I have difficulty with its holding that *Breed* v. *Jones,* 421 U.S. 519 (1975), does not prohibit Massachusetts from commencing adult criminal prosecutions against petitioners. Since I agree with the suggestion in footnote 1 of the court's opinion that *Younger* v. *Harris* does not bar this suit,[1] I would reluctantly uphold the stay and allow further proceedings to be held.

[1] Although the Supreme Court has never addressed this point, the most recent interpretations of *Younger's* doctrine of equitable restraint suggest to me that it does not bar federal intervention in pending state criminal proceedings when the highest court of the state has conclusively rejected the federal claim and when there is no reason whatsoever to believe that the state court will reconsider its earlier rulings. *See Schlesinger* v. *Councilman,* 420 U.S. 738, 756 (1975); *cf. Gibson* v. *Berryhill,* 411 U.S. 564, 577 (1973). Whether or not there is to be a general "futility" exception to the *Younger* doctrine, an exception seems appropriate in the case of double jeopardy claim-

I recognize the undesirable consequences of holding *Breed* retroactive, but I think Mr. Justice Rehnquist's opinion for a unanimous Court in *Robinson* v. *Neil*, 409 U.S. 505 (1973) virtually compels the conclusion that *Breed* is retroactive. In *Robinson*, the issue was the retroactivity of *Waller* v. *Florida*, 406 U.S. 916 (1972) which held that the double jeopardy clause prohibits a state from prosecuting an individual for an offense which had previously been the subject of a municipal prosecution. In 1962, Robinson had been tried and convicted in municipal court for three counts of assault and battery, and he was fined $50 on each count. Thereafter, he was tried upon state charges and was convicted and sentenced for up to 25 years in jail. The Court held *Waller* retroactive and ordered that the state conviction be vacated if the state and municipal offenses were found to be the same. The Court refused to apply the three prong *Linkletter-Desist* criteria, reasoning that they had no applicability to rules that in practice prevent a trial from taking place at all, rather than merely prescribing procedural rules. *Id.* at 510.[2]

I am not persuaded by the court's attempt to distinguish *Robinson* on the ground that the retroactive application of *Breed*, as was not the case with the retroactive application of *Waller* in *Robinson*, will make it impossible for the Commonwealth to impose sanctions on any

ants who are to be denied the opportunity in the state court system to demonstrate that they have a right not to be retried. *Cf. United States ex rel. Webb* v. *Court of Common Pleas*, 516 F.2d 1034, 1037 (3d Cir. 1975).

[2] The *Robinson* Court concluded that the state was unjustified in relying upon the belief that the state and the municipality were, like the state and the federal government, *see Bartkus* v. *Illinois*, 359 U.S. 121 (1959), separate sovereigns for purposes of the double jeopardy clause, and it intimated no view on the weight which should be accorded justifiable reliance in determining retroactivity. I too need not face that question. Whatever else might be said about Massachusetts' reliance on the concept of "continuing jeopardy", which has never attracted a majority of the Court, it was certainly no more reasonable than Florida's reliance on the "dual sovereignty" of its state and municipal governments.

of the petitioners. The *Breed* Court left no doubt that under California's system there was no bar to further juvenile proceedings against successful juvenile double jeopardy claimants. 421 U.S. at 541. Massachusetts' pre-*Breed* system did differ from California's,[3] but the differences are not significant. I see no constitutional impediment to further juvenile proceedings against those of the petitioners who are still juveniles,[4] and I believe the Massachusetts statutes can be construed to authorize such proceedings. But even if it were the case that none of the petitioners could hereafter be punished, I am not sure it would follow that *Robinson* is distinguishable. The *Robinson* Court recognized that its ruling seriously prejudiced the state's interest in imposing appropriate punishments upon wrongdoers; it observed that its ruling gave Robinson a "relatively painless form of immunity" ($150 in fines) from state prosecutions for what must have been serious offenses. *See* 409 U.S. at 510. I cannot imagine that *Robinson* would have been decided differently if the municipal prosecution had been dismissed with prejudice after jeopardy had attached, for I doubt that a distinction between relatively painless immunity and completely painless immunity can possess constitutional significance.

[3] Unlike the earlier California practice, a pre-*Breed* Massachusetts juvenile court would order a transfer without making an express finding of guilt. The Massachusetts court would, as a concomitant to the transfer, dismiss the juvenile complaint and cause an adult complaint to be issued.

[4] I see no double jeopardy bar to further *juvenile* proceedings against petitioners. Insofar as they might object to such proceedings, they are in a position which, for double jeopardy purposes, is identical to that of a criminal defendant who has succeeded in having a judgment of conviction set aside. Here, petitioners are objecting to the disposition of the juvenile proceedings. If the objections have merit, their cases can be remanded for further proceedings in the juvenile court. *See Breed* v. *Jones*, *supra*; *North Carolina* v. *Pearce*, 395 U.S. 711, 717 (1969).

That the juveniles' complaints were formally dismissed without a determination of guilt presents no constitutional problems. The dismissals clearly arose neither from what could have been a favorable determination on the merits, *compare United States* v. *Jenkins*, 420 U.S. 358 (1975), nor from any judicial or prosecutorial overreaching, *see Illinois* v. *Somerville*, 411 U.S. 458 (1973).

I also am unable to accept the suggestion that *Breed* can be characterized as a prophylactic rule directed primarily at making the adult trial "fairer" by reducing the need of the juvenile to "tip his hand" at the transfer hearing. *Breed*, like *Waller*, announces a rule which prevents the states from unconstitutionally placing an individual in jeopardy twice. Although avoiding "handtipping" is a value protected by the double jeopardy clause, it is not the primary one. If it were the case that a second trial would result in undue interference with the constitutionally protected interest only when no handtipping occurred at the first proceeding, *Robinson* presumably would have been decided differently: the case would have been remanded for a determination whether the municipal prosecution had prejudiced Robinson's subsequent state proceeding.

I would affirm the judgment of the District Court.

Supreme Court, U. S.
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In the Supreme Court of the United States.

OCTOBER TERM, 1976.

No. 76-1195.

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ON CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Petitioners' Reply Brief.

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The Issue Presented In This Cross-Petition Involves An Actual Controversy Appropriate For Resolution By This Court.

Respondents assert that cross-petitioners are seeking an advisory opinion from this Court on the question of whether the federal District Court abused its discretion by ordering a stay of state criminal proceedings.

In the classic sense, the rule against advisory opinions is applied "[w]hen the federal judicial power is invoked to pass upon the validity of actions by the Legislative and Executive Branches of the Government." *Flast* v. *Cohen*, 392 U.S. 83, 96 (1968). No such question, of course, is involved here. Nevertheless,

> "the Article III prohibition against advisory opinions reflects the complementary constitutional considerations expressed by the justiciability doctrine: Federal judicial power is limited to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process." *Id.* at 97.

The issue of the propriety of a federal court staying state court proceedings is both capable of, and indeed appropriate for, judicial resolution. It involves parties who are fully adversary. The issue is fully suitable for judicial resolution, and there is a genuine need for such resolution. It is "the kind of controversy courts traditionally resolve." *United States* v. *Nixon*, 418 U.S. 683, 696 (1974).

At issue is the Commonwealth's right to proceed with the pending criminal trials of well over 80 defendants. The Commonwealth's interest in proceeding against those indicted is opposed by the respondents' interest in preventing trials in the Superior Court on those indictments. This setting assures that there is "'that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.' *Baker* v. *Carr*, 369 U.S., at 204." *United States* v. *Nixon*, *supra*, at 697.

Respondents to this cross-petition allege that petitioners seek only an advisory opinion. Respondents assert the proposition that an actual controversy and, therefore, a justiciable issue have been presented only if this Court could avoid a decision on the merits by deciding that the stay was improper. For this proposition, respondents cite no authority and petitioner suggests that there is none.

However, respondents do appear to find some authority for this proposition in the manner in which the Court has resolved certain cases involving preliminary injunctions and petitions for declaratory relief. Since both issues in those instances rest upon equitable considerations, decision upon one issue will, most often, merge or control decision on the other. *Preiser* v. *Newkirk*, 422 U.S. 395, 401 (1975); *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922 (1975).*

The instant case does not present such a situation. Two separate issues are involved here: one, a matter of equitable restraint; the other, a question of law. Clearly, resolution of each issue is based upon separate considerations.

Therefore, it is quite clear that determination of the propriety of the issuance of the stay will not be rendered moot, nor constitute no more than an advisory opinion, by this Court's resolution of the merits of this case, if certiorari is granted in Case No. 76-6200. For example, the Court may always find, after argument, that certiorari was improvidently granted if, for instance, the issue of the retroactivity

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* *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), cited by petitioners, has no application to the case at bar. Nor does it stand for the proposition that this Court is foreclosed from considering both the merits of the case and the propriety of the stay. *Cohen* dealt with the question of whether there was a right of appeal under 28 U.S.C. § 1291 from an order of the federal District Court denying a corporation's motion to require a shareholder to post security in a derivative action. Section 1291 concerns the jurisdiction of the Court of Appeals, not the Supreme Court of the United States.

of *Breed* v. *Jones*, 421 U.S. 519 (1975), is deemed not ripe for adjudication. Moreover, disposition on the merits itself may take more than one form. Even if *Breed* v. *Jones* were held to be fully retroactive, it would still be required that each individual demonstrate that he was, in fact, subjected to a proceeding identical to that condemned in *Breed*, for no court has held that *Breed* proceedings were required in the Commonwealth, and petitioners (The Justices) have made no such concession. It is also entirely conceivable that this Court might rule that *Breed* should be applied retroactively only to those individuals who can establish not only that they were subject to *Breed* procedures, but that they were prejudiced by such proceedings. Clearly, then, the stay by its own terms would remain in effect until these matters were concluded. It is petitioners' contention that the only action which this Court might take which would render the decision on the issue of the stay advisory only is for this Court to deny certiorari in Case No. 76-6200, and for that reason petitioners have conditioned the granting of their cross-petition upon the granting of certiorari in Case No. 76-6200.

Therefore, petitioners suggest that so long as the question before the Court is one "that is appropriate for judicial determination," is "definite and concrete, touching the legal relations of parties having adverse legal interests" and is "a real and substantial controversy admitting of specific relief through a decree of a conclusive character," it is cognizable by this Court under the Constitution. *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 240, 241 (1937). The question raised in the cross-petition meets these criteria. No matter what conclusion is reached on the ultimate issue, this question is "of the type which is traditionally justiciable." *United States* v. *Nixon*, *supra*, 418 U.S. at 697.

Conclusion.

For the reasons stated above and in their petition, petitioners respectfully suggest that a writ of certiorari should be granted.

Respectfully submitted,

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